IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-616

MOHASCO CORPORATION,

Petitioner,

vs.

RALPH H. SILVER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JONATHAN I. BLACKMAN
One State Street Plaza
New York, New York 10004

Counsel for Respondent

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-616

MOHASCO CORPORATION,

Petitioner,

vs.

RALPH H. SILVER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A23-44) is reported at 602 F.2d 1083. The opinion of the district court (Pet. App. A1-21) is not officially reported.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a conflict exists among the courts of appeals of sufficient seriousness to warrant this Court's further review on the issue of whether the provision of Section 706(c) of Title VII of the Civil Rights Act of 1964[1] requiring up to 60 days' deferral to a state fair employment

---

1 42 U.S.C §2000e-5(c) (1970 ed., Supp. V) (hereafter "Section 706(c)")

practices agency prior to the processing of a charge of employment discrimination by the Equal Employment Opportunity Commission should be construed as affecting the time periods contained in Section 706(e) of Title VII[2] for timely filing charges of employment discrimination with the Equal Employment Opportunity Commission.

2. Whether a conflict exists among the courts of appeals as to whether the sequence in which a pro se complainant files charges of employment discrimination as between the Equal Employment Opportunity Commission and a state fair employment practices agency affects the period in which the filing with the Equal Employment Opportunity Commission will be deemed timely.

3. Whether there is any conflict among the courts of appeals concerning the rule that the permissible scope of a Title VII complaint in a district court is determined by the matters that could reasonably be expected to grow out of an investigation by the Equal Employment Opportunity Commission of the complainant's charge.

COUNTERSTATEMENT OF THE CASE

Respondent Ralph H. Silver ("Silver") was hired as a senior marketing economist by petitioner Mohasco Corporation ("Mohasco") on July 15, 1974. During his thirteen months of employment by Mohasco, Silver, who is Jewish, felt himself to be the object of harassment and abuse by Mohasco's executives because of his religion, culminating in his religiously motivated discharge by Mohasco on August 29, 1975. Following his discharge, Silver began to suspect that Mohasco was disseminating false references concerning his allegedly unsatisfactory work to prospective employers, including advising such employers that Silver was Jewish, with the result that he has been unable to obtain other

---

2 42 U.S.C §2000e-5(e) (1970 ed., Supp. V) (hereafter "Section 706(e)")

employment.

On June 15, 1976, 291 days after his discharge, Silver filed a charge of employment discrimination with the District Office of the Equal Employment Opportunity Commission ("EEOC") in Buffalo, New York, after having been informed on June 10, apparently by an EEOC employee, that a 300-day limitation on the filing of such charges existed. The charge, in the form of a letter to the EEOC, alleged that Silver had been "both hired and fired because of my religion". The charge also alluded to the question of references, noting that Mohasco's personnel department had agreed to mitigate the impact of Silver's dismissal by allowing him to refer reference inquiries directly to the personnel department and to tell prospective employers that he had resigned. After requesting an opportunity to meet with someone from the EEOC to explain "[t]he many supporting facts, momoranda [sic], etc., which I have for you", the charge concluded with the statement, "this, then, is my rough, incomplete and hastily drafted complaint."

Upon receiving Silver's charge, the EEOC, on the same day, following its normal procedure, transmitted a copy of the charge to the State of New York Division of Human Rights ("NYSDHR"), in order to comply with Section 706(c) of Title VII, which mandates deferral by the EEOC to the applicable state fair employment practices agency if one exists. On June 18, 1976, the NYSDHR notified Silver that it had received his charge from the EEOC and requested that he file a formal complaint, which he did on August 12, 1976. In the meantime, the EEOC had notified Silver on June 16, 1976 of its deferral to the NYSDHR.

Section 706(c)'s deferral period, measured from the date of mailing of Silver's charge to the NYSDHR by the EEOC, expired on August 13, 1976. The EEOC then commenced its processing of the charge by sending a Notice of Charge to Mohasco on August 20, 1976. The EEOC took no further action, however, notifying Silver on the same day

that it did not plan to consider the charge until after the NYSDHR's proceedings had been completed.

Following his initial June 15, 1976 letter to the EEOC, Silver attempted on several occasions to develop further the issue of references to prospective employers to which he had first adverted in the June 15 charge. On August 31, 1976, he sent the NYSDHR's field representative a letter alleging in great detail that he was being "black listed" by Mohasco through the circulation of bad references, and forwarded a copy of this letter to the District Director of the EEOC. On December 19, 1976, he sent another letter to the NYSDHR representative, repeating his charge of blacklisting, in which he stated "I have requested three times, this makes the fourth, that my complaint be amended to include blacklisting".

Despite these charges of continuing blacklisting through negative references, neither the NYSDHR nor later the EEOC considered or investigated this aspect of Silver's claims. On February 9, 1977, the NYSDHR issued its determination, finding no probable cause to believe that Silver had been terminated on account of his religion, but not discussing the question of post-termination references. This determination was affirmed by the State Human Rights Appeal Board. On August 24, 1977, the EEOC, apparently without independent investigation, issued a similar "no reasonable cause" determination, relying upon the findings and record prepared by the NYSDHR and giving substantial weight to those findings. The EEOC thereupon notified Silver of his right to sue in the district court, and on November 23, 1977, within 90 days of receiving his right-to-sue letter, Silver commenced a civil action. His pro se complaint alleged that Mohasco had both discharged him on religious grounds in violation of Title VII and had further violated Title VII on a continuing basis by giving out bad references to prospective employers with the same discriminatory intent.

The district court granted summary judgment for Mohasco. Without reaching the merits, the district court held that Silver's June 15, 1976 charge was not timely filed with the EEOC, depriving the court of jurisdiction over Silver's subsequent Title VII suit based upon the allegations in the charge. In reaching this conclusion, the district court acknowledged that the time limitation applicable to the filing of Silver's charge was the 300-day period provided by Section 706(e) for charges filed in "deferral states" such as New York, which have their own fair employment practices laws and agencies such as the NYSDHR charged with the enforcement of such laws. (Pet. App. A9). However, the district court then read the provision of Section 706(c) requiring 60 days' deferral by the EEOC to the appropriate state fair employment practices agency (the so-called "706 agency") prior to EEOC processing of a charge to operate as an implied reduction in the 300-day period afforded by Section 706(e) to only 240 days when no filing with the state agency has been made prior to filing with the EEOC. Because Section 706(c) provides that "no charge may be filed" prior to expiration of the 60-day deferral period, the district court concluded that when a charge is "filed" first with the EEOC and then referred by the EEOC to a state 706 agency, the initial EEOC filing must occur by the 240th day after the incident of discrimination in order to be timely. (Pet. App. A6-19). The district court also held that the allegations of continuing post-termination discrimination contained in the complaint, revolving around Mohasco's practice of supplying prospective employers with bad references concerning Silver, should be dismissed for failure to charge such discrimination before the EEOC. (Pet. App. A19-20).

The court of appeals reversed on both issues. On the question of timeliness, the court of appeals, in a 2-1 decision, refused to construe the "no charge may be filed" language of Section 706(c) as impinging upon or modifying the express time periods for filing EEOC

charges set forth in Section 706(e). 602 F.2d 1086-1090. The majority of the court of appeals also rejected Mohasco's alternative argument that a complainant's charge must be initially filed with the state 706 agency (as opposed to being first filed with the EEOC and then referred by the EEOC to the state 706 agency) in order to make applicable Section 706(e)'s longer 300-day limitations period for filing charges when proceedings have been "initially instituted" with the State agency. 602 F.2d 1088, n.14. On the question of adequacy of Silver's EEOC charge to support the "blacklisting" allegations of his judicial complaint, the court of appeals unanimously held that the scope of the EEOC investigation that could reasonably be expected to grow out of the discrimination charged would embrace the "blacklisting" allegations, particularly since Silver had explicitly notified both the EEOC and the NYSDHR of these allegations only 11 days after the EEOC commenced processing his initial "rough, incomplete and hastily drafted" charge. 602 F.2d 1090-1091, 1091 n.2.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON THE ISSUE OF TIMELINESS OF SUFFICIENT SIGNIFICANCE TO WARRANT THIS COURT'S REVIEW OF THE DECISION BELOW, WHICH IS FULLY CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

1. Petitioner Mohasco relies principally upon a conflict among the courts of appeals to justify this Court's review of the Second Circuit's decision that the phrase "no charge may be filed" in Section 706(c) should not be read as implicitly modifying Section 706(e)'s express 300-day time limit on filing charges with the EEOC. It cannot be denied that while the Tenth Circuit, the Sixth Circuit, and the Eighth Circuit are in agreement with the approach taken by the Second Circuit in this case, the Seventh Circuit has taken a contrary position. Compare Vigil v. American Telephone & Telegraph Co., 455 F.2d 1222 (10th Cir. 1972); Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723 (6th Cir. 1972); Richard v. McDonnell Douglas Corp., 469 F.2d 1249 (8th Cir. 1972) with Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972). However, the authority of Moore v. Sunbeam Corp., Mohasco's sole authority for the argument that the sixty-day deferral period of Section 706(c) operates as a limitation on the filing periods of Section 706(e), has been seriously undermined by subsequent developments.

First of all, the legislative history made when Title VII was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, gives unmistakable evidence that Congress agreed with the interpretation given to the phrase "no charge may be filed" in Section 706(c) by the Tenth Circuit in Vigil v. American Telephone & Telegraph Co., supra, and followed by the Second Circuit in the instant case. In the bill initially passed by the Senate, S. 2515, Section 706(c) was amended to replace the language "no charge may be filed" with the phrase "the Commission shall take no action with respect to the investigation of such charge before the expiration of sixty days after proceedings have been commenced under ... State or local law." 118 Cong. Rec. 290 (1972). The elimination of the phrase "no charge shall be filed [prior to the end of the deferral period]" was intended to make it clear that a charge could be filed with the EEOC prior to deferral in accordance with this Court's holding in Love v. Pullman Co., 404 U.S. 522 (1972). 118 Cong. Rec. 4941 (1972) (Section-by-Section Analysis). Most significantly, the House-Senate Conference Committee felt that the change made by the Senate bill in the existing statutory language was unnecessary. As stated in the Conference Report:

> Sections 706(c) and (d) - These subsections, dealing with deferral to appropriate State and local equal employment opportunity agencies, are identical to sections 706(b) and (c) of the Civil Rights Act of 1964. No change in these provisions was deemed necessary in view of the recent Supreme Court decision of Love v. Pullman Co., _____ U.S. _____, 92 S. Ct. 616 (1972) which approved the present EEOC deferral procedures as fully

> in compliance with the intent of the Act. That case held that the EEOC may receive and defer a charge to a State agency on behalf of a complainant and begin to process the charge in the EEOC upon lapse of the 60-day deferral period, even though the language provides that no charge can be filed under section 706(a) [now Section 706(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law. Similarly, the recent circuit court decision in Vigil v. AT&T, _____ F.2d _____, 4 FEP cases 345 (10th Cir. 1972), which provided that in order to protect the aggrieved person's right to file with the EEOC within the time periods specified in section 706(c) and (d) [i.e., present Section 706(e)], a charge filed with a State or local agency may also be filed with the EEOC during the 60-day deferral period, is within the intent of this Act. (emphasis supplied) 118 Cong. Rec. 7564 (1972) (Section-by-Section Analysis).

Thus, the Conference Committee, in reporting on the bill that was eventually passed without further change by both Houses, expressly approved Vigil v. American Telephone & Telegraph Co. and concurred in Vigil's holding that the language "no charge may be filed" appearing in Section 706(c) does not prevent filing during the deferral period in order to satisfy the time requirements of Section 706(e).

This legislative history was cited to the Seventh Circuit in Moore v. Sunbeam Corp. on petition for rehearing but was rejected by that court on the ground that it was not relevant to construction of the pre-1972 statute, 459 F.2d at 830. This objection is not applicable to the instant action which involves construction of the statute as amended in 1972.[3] Congressional approval of Vigil strongly undercuts the continued vitality of Moore.

This Court's subsequent decision in Oscar Mayer & Co. v. Evans, ___ U.S. ____, 99 S. Ct. 2066 (1979), casts further question upon the correctness of the decision in Moore v. Sunbeam Corp. In Oscar

---

3 This Court has noted in another context that the Section-by-Section Analysis of the Conference Report on the 1972 amendments provides "the final and conclusive confirmation of the meaning" of Title VII. Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 365 (1977)

Mayer, the Court construed §14(b) of the Age Discrimination in Employment Act of 1967 ("ADEA"), which it characterized as "patterned after and . . . virtually in haec verba with §706(b) of Title VII, 42 U.S.C. §2000e-5(c)." ___ U.S. at ___, 99 S. Ct. at 2071. The Court emphasized the distinction between the ADEA counterpart of Section 706(c), which insures the substantive purpose of allowing the state or local 706 agency to have the first opportunity of resolving complaints of employment discrimination, and the ADEA counterparts of Section 706(e), which functions as a limitation on state claims. In holding that an age discrimination plaintiff's failure to file a charge with the applicable state fair employment practices agency within the state's statute of limitations for filing such charges cannot deprive such a plaintiff of his federal remedy, the Court stated:

> The ADEA's limitations periods are set forth in explicit terms in 29 U.S.C. §§626(d) and (e) [the counterparts to Section 706(e) of Title VII], not 14(b), 29 U.S.C. §§633(b) [the counterpart "virtually in haec verba" to the deferral provision of Section 706(c) of Title VII]. Sections 626(d) and (e) adequately protect defendants against stale claims. We will not attribute to Congress an intent through §14(b) to add to these explicit requirements by implication and to incorporate by reference into the ADEA the various state-age discrimination statutes of limitations. ___ U.S. at ____, 99 S. Ct. at 2074-2075 (emphasis supplied).

This Court's refusal in Oscar Mayer to "add to these explicit requirements [of the ADEA's counterparts of Section 706(e)] by implication" suggests powerfully that the Court in Moore misread Title VII when it modified the explicit limitations period of Section 706(e) by implying from the deferral provision of Section 706(c) a sixty-day reduction in that period.

Finally, as the court of appeals noted below, the EEOC has consistently maintained that a charge is "filed" for purposes of Section 706(e)'s limitation period on the day that the EEOC receives it, in accordance with the holdings of Vigil, Anderson and Richard and the decision of the Second Circuit in the instant case. 1083 F.2d at 1090. Only months

ago this Court reaffirmed its long-standing doctrine that the interpretation of the statute by the EEOC, as the agency charged with administering Title VII, is "entitled to great deference." Oscar Mayer & Co. v. Evans, ___ U.S. at _____, 99 S. Ct. at 2074 (1979), quoting Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

The doubt that these later developments casts upon the continuing authority of Moore v. Sunbeam Corp. makes the conflict among the circuits relied upon by petitioner more apparent than real. While the cases are certainly not in perfect harmony, the relatively minor discord introduced by Moore v. Sunbeam Corp. does not justify this Court's discretionary review.

2. As a second string to its bow, Mohasco urges that this Court should review the Second Circuit's decision because of an asserted conflict among the circuits on the issue of whether a Title VII complainant must file his charge before the appropriate state 706 agency first in order to be able to take advantage of Section 706(e)'s longer 300-day limitation period, rather than filing first with the EEOC and relying on the EEOC to refer his charge to the appropriate state agency. There is in fact no decision of a court of appeals which supports Mohasco's argument that the order of filing as between the EEOC and the state agency should determine which limitation period governs, much less a conflict among the circuits on this issue.

Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975) (en banc), which Mohasco extensively discusses, does not support the proposition that the order of filing as between the EEOC and the state 706 agency should control the applicability of the 300-day period, but rather holds that where the state limitations period is less than 180 days, a complainant must file his charge before the state agency within

180 days in order to preserve his federal right. 511 F.2d at 1232.[4] Nor does even the dictum in Olson that a state charge must be filed within 180 days regardless of the state statute of limitations, 511 F.2d 1233, support the position that the order of filing determines the length of the federal limitation period. The Second Circuit's holding that the 300-day period of Section 706(e) is available when a charge is referred by the EEOC to a state agency for initial action, as well as when a charge is filed in the first instance with the state agency, thus raises no conflict with any other appellate decision.

3. The Second Circuit's decision on the timeliness issue is in any case fully consistent with this Court's prior decisions. Love v. Pullman Co., 404 U.S. 522 (1972), holds that proceedings before the applicable state 706 agency need not be initiated by the complainant himself at all, but can be initiated by the EEOC through the EEOC's referral of a charge previously filed with it to the state agency. Love's refusal to read the "no charge may be filed" language of Section 706(c) literally so as to require a second EEOC "filing" following the completion of the 60-day deferral period forecloses the appeal to the literal that Mohasco makes, particularly since the Love court expressly recognized the differing purposes of Section 706(c) and Section 706(e) in holding that the EEOC's referral procedure satisfied both provisions of Title VII. 404 U.S. at 526. The clear teaching of Love, especially in light of the Court's later discussion in Oscar Mayer & Co. v. Evans, ___ U.S. ___, 99 S. Ct. 2066 (1979), is that as long as there is an opportunity for the state agency to act on a charge of employment discrimination (thus satisfying the substantive goal of the deferral mechanism of Title

---

4 Its holding is thus inapplicable to the instant case, in which Silver's charge was referred to the NYSDHR well within New York's one-year statute of limitations on employment discrimination complaints. N.Y. Executive Law §297(5) (McKinney 1972).

VII), neither the sequence of filing as between the EEOC and the state 706 agency nor the timing of filing with the state agency is of legal significance as respects the timeliness of a plaintiff's federal filing.[5]

II. THE COURT OF APPEALS' DECISION ON THE ISSUE OF "BLACKLISTING" INVOLVED THE APPLICATION OF UNDISPUTED LAW TO THE PARTICULAR FACTS PRESENTED BY THIS CASE, AND DOES NOT MERIT DISCRETIONARY REVIEW BY THIS COURT.

In reversing the district court's dismissal of Silver's "blacklisting" charges because such charges were not detailed within the four corners of his original letter to the EEOC, the court of appeals applied well-settled law governing the relationship between the contents of an EEOC charge and a complaint in a later district court civil action. As petitioner itself admits (Petition, p. 21), the applicable legal standard is well settled in the courts of appeals: the proper scope of a Title VII complaint is determined by the scope of the EEOC investigation that could reasonably be expected to grow out of the charge of discrimination filed with the EEOC. See, e.g., EEOC v. Bailey Co., Inc., 563 F.2d 439, 446 (6th Cir. 1977), cert. denied, 435 U.S. 915 (1978); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-399 (3d Cir. 1976), cert. denied, 429 U.S. 1041 (1977); Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971); Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970). The court of appeals' unanimous decision that Silver's June 15, 1976 letter to the EEOC, as supplemented or amended by his later submissions, sufficiently charged "blacklisting" to make such allegations properly includible in Silver's judicial complaint, is fully supported by the record and raises no substantial legal issue warranting this Court's review.

---

5 Indeed, in an opinion that does not directly discuss the point, this Court has already refuted Mohasco's second contention that the order of filing as between EEOC and state agency controls the application of Section 706(e)'s 300-day period. See Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 359 n.8 ("If a charge has been initially filed with or referred to a state or local agency, it must be filed with the EEOC within 300 days after the practice occurred. . . .") (emphasis supplied). This contention has been directly considered and rejected in Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976); Trim v. Restaurant Marketing Associates, Inc., 20 EPD ¶30,052 (N.D. Cal. 1979); Jacobs v. Board of Regents, 473 F. Supp. 663, 667 (S.D. Fla. 1979); Din v. Long Island Lighting Co., 463 F. Supp. 654 (E.D.N.Y. 1979) and Lo Re v. Chase Manhattan Corp., 431 F. Supp. 189, 195-196 (S.D.N.Y. 1977), among other cases. Cf. Ortega v. Construction and General Laborers' Union, No. 390, 396 F. Supp. 976, 982 (D. Conn. 1975).

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Second Circuit in this case be denied in all respects.

Respectfully submitted,

JONATHAN I. BLACKMAN
One State Street Plaza
New York, New York 10004

Counsel for Respondent